IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals
Hoekstra, PJ, and Sawyer and Gleicher, JJ

In the Matter of Wangler/Paschke,
Minor children

Circuit Court No.: 07-035009-NA
Court of Appeals No.: 318186
Supreme Court No.: 149537

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AMICI CURIAE BRIEF OF THE LEGAL SERVICES ASSOCIATION OF MICHIGAN AND THE MICHIGAN STATE PLANNING BODY FOR THE DELIVERY OF LEGAL SERVICES TO THE POOR

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court commit reversible error by failing to follow the Michigan Court Rules and failing to provide Appellant with procedural due process when it failed to adjudicate her as an unfit parent either by validly accepted plea of admission or by trial, and subsequently terminated her parental rights?

   Amici curiae answer: Yes.

2. Is Appellant's appeal a timely direct attack on the trial court's exercise of jurisdiction, as opposed to an impermissible collateral attack, where the trial court failed to adjudicate Appellant as an unfit parent following a trial or acceptance of a valid plea of admission on the record?

   Amici curiae answer: Yes.

3. Does this Court's opinion in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), permit Appellant, who was never adjudicated as an unfit parent, to raise a constitutional challenge to the trial court's erroneous exercise of jurisdiction, where *Hatcher* only precludes collateral attacks on jurisdiction raised by parents who have been validly adjudicated as unfit?

   Amici curiae answer: Yes.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Legal Services Association of Michigan ("LSAM") and the Michigan State Planning Body for the Delivery of Legal Services to the Poor ("MSPB" and together with LSAM, "Amici") submit this joint *amici curiae* brief to the Michigan Supreme Court in *In re Wangler/Paschke*. LSAM is a Michigan nonprofit organization incorporated in 1982. LSAM's members are thirteen of the largest civil legal services organizations in Michigan and collectively provide legal services to low-income individuals and families in more than 50,000 cases per year.[1] LSAM members have broad experience with a variety of family law cases where a low-income parent's rights to custody of his or her child are at stake—these involve custody and parenting time cases, third party custody actions, minor guardianship cases, child abuse and neglect cases, paternity proceedings, and adoption proceedings. LSAM members share a deep institutional commitment to ensuring that the rights of low-income families—both parents and children—are respected in these proceedings. Almost all LSAM members work in public benefits, family law, and housing cases with low-income families that are involved in and impacted by adoption, paternity, or similar family law proceedings. And all LSAM members are institutionally interested in and committed to providing fair and equal access to the justice system for low-income individuals.

MSPB is an unincorporated association of thirty-five individuals, including leaders of the bench, the legal services community, the private bar, and community services organizations. MSPB acts as a forum for planning and coordination of the state's efforts to deliver civil and

[1] LSAM's members are: the Center for Civil Justice, Elder Law of Michigan, Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Michigan Advocacy Program, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Michigan Poverty Law Program, and the University of Michigan Clinical Law Program.

criminal legal services to the poor. MSPB was initially created through a mandate of the Legal Services Corporation ("LSC"). Although LSC no longer requires that states have a formally designated State Planning Body, MSPB has continued to function at the request of the programs and their state funder. MSPB's mission is to plan, organize, and coordinate an effective civil legal services delivery system in the State of Michigan. In addition to coordinating pro bono services, MSPB advocates on behalf of the state's indigent to the Michigan Supreme Court, the State Bar of Michigan, and the State Court Administrative Office. MSPB is committed to assuring equal access for the poor to the legal system, including the family court system.

Amici submit this joint brief on behalf of the interests of indigent parents in protecting their constitutional and statutory rights to a relationship with their children. Amici respectfully request that the Court reverse the judgment of the Court of Appeals and remand this case to the trial court for an adjudication that conforms to the procedural mandates of the Michigan Court Rules for child protective proceedings.

I. INTRODUCTION

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution prohibits the states from "depriv[ing] any person of life, liberty, or property, without due process of law." The U.S. Supreme Court has interpreted the Clause to "provide[] heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997). A parent's right to the care, custody, and control of his or her children is one such fundamental right: a "natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Santosky v Kramer*, 455 US 745, 758-759; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Moreover, the Constitution presumes that a child's parents are fit and that "fit parents act in the best interests of their children." *Troxel v Granville*, 530 US 57, 68; 120 S Ct 2054; 147 L Ed 2d 49 (2000). The state, however, has a legitimate interest in protecting "the moral, emotional, mental, and physical welfare of" children, and in certain circumstances this legitimate state interest may justify the separation of parent from child. *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972). In order to remove a child from the custody of their parents, and in doing so, deprive the parent of a fundamental right, the U.S. Constitution mandates that significant procedural protections be afforded the parent. *See, e.g.*, *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976).

In Michigan, the juvenile code, MCL 712A.1 *et seq*, and Subchapter 3.900 of the Michigan Court Rules (the "Court Rules") set forth the procedures by which the state may exercise authority over minor children and, ultimately, deprive a parent of his or her parental rights. Generally, the Court Rules provide for a two-phase process. *See In re Sanders*, 495 Mich 394, 404-407; 852 NW2d 524 (2014). First, the family court must decide in the adjudicative phase whether to take jurisdiction over the child. *Id.* at 404-406. During this phase, the court

must determine whether one or more allegations in a petition of abuse and neglect is true, and, if proven, whether the allegations would bring the child within the court's protective jurisdiction. *Id.*

Second, the court must determine how to ensure the safety and well-being of the child in the dispositional phase. *Id.* at 406-407. It is only at this stage and with the protection of myriad statutory and constitutional safeguards that the court may terminate parental rights. *Id.* In the interests of finality, this Court has ruled that once an order terminating parental rights is entered, the first of these two phases (the adjudication) generally cannot be collaterally attacked on appeal. *See In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993).

Here, the trial court never properly adjudicated the fitness of the Appellant Mother Melissa Paschke ("Appellant"), instead taking jurisdiction by way of a months-old mediation agreement. The court's next order was an order terminating Appellant's parental rights. Following the termination order, Appellant appealed, challenging the assumption of jurisdiction.

In a split opinion, the Court of Appeals majority erroneously deemed this a collateral attack on the trial court's assumption of jurisdiction and denied the appeal as untimely. *In re Wangler*, 305 Mich App 438, 440; 853 NW2d 402 (2014). The majority improperly ignored the trial court's procedural missteps and elevated principles of finality over fundamental due process rights in refusing to consider a constitutional challenge to the trial court's adjudication.

Judge Gleicher dissented. *Id.* at 448-459 (GLEICHER, J. dissenting). She would have held that the trial court never properly exercised jurisdiction and that, because termination occurred at the initial disposition, Appellant's appeal was not a collateral attack. *Id.* at 456. Judge Gleicher was correct. The trial court never properly exercised jurisdiction over the children and thus this appeal is a direct—rather than collateral—attack. Accordingly, the Court should reverse the

judgment of the Court of Appeals and remand the case to the trial court for a proper adjudication in accordance with fundamental constitutional principles and the Court Rules.

II. FACTUAL BACKGROUND

On January 11, 2012, the Department of Human Services ("DHS") filed a Petition of Abuse and Neglect (the "Petition") to remove three minor children[2] from the custody of Appellant. DHS alleged in the Petition that Appellant was a heroin addict and the victim of domestic violence at the hands of her then live-in boyfriend. At the preliminary hearing before a family court referee, Appellant conceded that probable cause existed to authorize the petition and did not object to DHS seeking to continue their foster placement with a maternal aunt. *See* Transcript of Preliminary Hearing (Continued from 1-11-12) (Jan 19, 2012), App'x to Appellant's Brief ("App'x") 37a, 48a-50a. In addition, Appellant agreed to submit to random drug testing, to participate in a substance abuse program, and to remove her boyfriend from the home. *Id.* at 39a-40a. At the conclusion of the hearing, the family court referee ordered the parties to participate in a pilot mediation program. Order After Preliminary Hearing (Jan 27, 2012), App'x 59a, 63a.

Mediation took place on February 28, 2012, at the conclusion of which the parties signed a mediation resolution. HDC Ctr. for Dispute Resolutions Sanilac Co. Child Protective Proceedings (Feb 28, 2012), App'x 66a. In the resolution, the parties agreed that "the mother's Plea of Admission and the issue of jurisdiction will be held in abeyance for a period of six months." *Id.* at 66a. Appellant further agreed to a DHS Service Plan that included drug treatment, a No Contact Order with her boyfriend, and supervised visitation with her children at

[2] While this appeal has been pending, one of the minor children has turned 18 and therefore is no longer under the court's jurisdiction. This appeal thus concerns two minor children, Joshua Wangler, age 16, and Marissa Paschke, age 12.

the discretion of DHS. *Id.* at 66a-67a. The parties requested that the court set a "review hearing" date within 90 days. *Id.* at 67a. The family court judge signed the agreement, which noted "This Mediation Agreement is the order of the Court." *Id.* The mediation agreement was filed with the trial court. *See id*. at 66a-67a.

Also on February 28, 2012, Appellant signed a plea form, which was filed with the court. Entry of Plea (Feb 28, 2012), App'x 68a. The plea form included provisions waiving certain rights, including the right to a trial, and stated, "I understand the plea, if accepted by the court, could later be used to terminate my parental rights to the child(ren) identified on this document." *Id.* On the plea form, Appellant admitted the allegations in paragraphs 8-14 of the Petition, including:

- A Children's Protective Services case was opened in November 2011 due to domestic violence and drug abuse, at which time Appellant agreed to services.
- The services agreed to in November of 2011 insufficiently protected the children from continuing harm.
- Appellant failed to maintain contact with her caseworker, failed to verify receipt of substance abuse treatment, and tested positive for opiates and cocaine at random drug screens.
- A domestic dispute occurred between Appellant and her boyfriend on December 28, 2011.

Id. at 69a-72a.

Though the mediation agreement and the accompanying plea were filed with the court on February 28, 2012, the parties never appeared before the judge or the family court referee to offer any testimony on the record. Neither the judge nor the referee questioned Appellant on the record as to whether her plea was entered intelligently and voluntarily or whether the plea form contained accurate information as required by MCR 3.971.

For the next several months, which was still the pre-adjudication stage of the case, DHS provided Appellant with services consistent with the mediation agreement. Appellant briefly enrolled in substance abuse counseling, complied with daily drug testing, and participated in parenting classes. However, on multiple occasions the assigned DHS case worker reported difficulty contacting Appellant; that Appellant missed drug testing appointments; and that Appellant was jailed on two occasions. Throughout this period of roughly one year, the court on four occasions held what it incorrectly deemed "dispositional review" hearings to assess Appellant's progress and compliance with the agreement. *See generally* App'x 77a-207a (collecting DHS Updated Court Reports, Transcripts of Dispositional Review Hearings, and Orders Following Dispositional Review Hearings). Appellant appeared at only one such hearing. *Id.*

Prior to the January 31, 2013 "dispositional review" hearing,[3] DHS requested that the court proceed toward termination based on Appellant's lack of progress with the services plan. Updated Court Report (Jan 24, 2013), App'x 185a, 189a. Appellant was again absent from the hearing.[4] Transcript of Dispositional Review Hearing (Jan 31, 2013), App'x 190a, 191a. On the record, the court acknowledged that no order adjudicating Appellant had been entered:

> [I]f there hasn't been an established jurisdictional level, based on the mediation, I will take at this point, formal jurisdiction as an Act 87 ward. I think there probably is an order or something to that effect in the file, but if there's not, there will be as of today

[3] Although the Court characterized this hearing as a "dispositional review" hearing, it was not. The court never adjudicated Appellant as unfit and never properly exercised jurisdiction over the children and therefore could not have proceeded to the dispositional phase. Accordingly, this hearing was a pre-adjudication hearing.

[4] Prior to the hearing, DHS last had contact with Appellant on December 9, 2012. A December 18, 2012 letter from the Wayne County Jail was also entered into the record indicating that Appellant was incarcerated until "at least December 26, 2012." DHS Memo, App'x 184a.

> based . . . on the stipulated mediation results. That's the purpose, my understanding, of the mediation was to avoid the need for a Jury trial and findings and putting people through that. Now, the failure to comply since August . . . by the mother is a post-mediation event, so I think that I can go back and say that we have a basis for jurisdiction, we have a basis for placement.

Id. at 195a. The court then granted DHS's request to file a supplemental petition seeking termination of Appellant's parental rights. *Id.* at 196a-197a.

A formal "order following dispositional review/permanency planning hearing" was entered on February 4, 2013. Order Following Dispositional Review/Permanency Planning Hearing (Feb 4, 2013), App'x 202a. Through that order, the court formally took jurisdiction over the children and authorized DHS to seek termination of Appellant's parental rights:

> Based upon the stipulated Mediation Resolution, the court takes formal jurisdiction of the minor children as an Act 87 Ward. . . . DHS may file a supplemental pleading setting forth termination of parental rights of any of the three parents, if warranted. Court is not ordering DHS to file the petition.

Id. at 206a. This was the first order in which Appellant was adjudicated by the Court.

DHS filed a Supplemental Petition of Abuse and Neglect on March 13, 2013 seeking termination of Appellant's parental rights. Supplemental Petition Seeking Termination of Parental Rights (Mar 13, 2013), App'x 208a. DHS sought termination based on desertion (MCL 712A.19b(3)(a)(ii)), failure to remedy the conditions leading to adjudication (MCL 712A.19b(3)(a)(i)), and a failure to provide proper care and custody (MCL 712A.19b(3)(g)). *Id.* at 209a. On June 26, 2013, the court heard only the testimony of the DHS caseworker and oral argument from the parties. *See generally* Motion Hearing and Termination of Parental Rights (June 26, 2013), App'x 220a. On July 16, 2013, the trial court terminated Appellant's parental rights, finding support for each of the factors alleged in the DHS Supplemental Petition. *See*

generally Opinion and Decision (July 16, 2013), App'x 287a. The court further ruled that the best interests of the children would be served by termination. *Id.* at 293a-295a.

Appellant appealed the trial court's termination of her parental rights. In a split opinion, the Court of Appeals majority dismissed her appeal as untimely. *In re Wangler*, 305 Mich App 438, 440; 853 NW2d 402 (2014). It reasoned that the appeal of the underlying adjudication was an impermissible collateral attack on jurisdiction under this Court's opinion in *Hatcher*.

Judge Gleicher dissented. *See id.* at 448-459 (GLEICHER, J. dissenting). She disagreed that the appeal was a collateral attack, reasoning that the trial court never acquired jurisdiction in the first place. *Id.* at 448. She would have held that termination occurred at the initial disposition, thus making review of the adjudication timely. *Id.* Considering the merits of the adjudication, Judge Gleicher would have further held that the trial court erroneously took jurisdiction based on the mediation and Appellant's plea without properly satisfying itself that the plea was taken in satisfaction of due process and in compliance with the Court Rules. *Id.* at 453-456.

Appellant then filed an application for leave to appeal to this Court. On April 1, 2015, the Court granted Appellant's application and ordered briefing on three issues:

> (1) the meaning of the phrase "dispositional order" within the context of a termination of parental rights proceeding; (2) whether the termination order constituted the first dispositional order; and (3) whether and to what extent the collateral attack analysis in *In re Hatcher*, 443 Mich 426, 505 NW2d 834 (1993), extends to the respondent's due process challenge.

In re Wangler, 497 Mich 986; 861 NW2d 44 (2015).

III. ANALYSIS

A. The Court Rules set forth the procedural process for child protective proceedings

The Court Rules govern child protective proceedings and set forth a specific process for ensuring a child's safety while at the same time guarding the constitutionally protected due process rights of parents. Generally, a court determines whether it can take jurisdiction over a child in the first instance during the adjudicative phase of a child protective proceeding. Only after validly exercising jurisdiction can the court determine during the second phase—the dispositional phase—what course of action will best ensure the child's safety. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

1. Child protective proceedings begin with the filing of a petition

Child protective proceedings begin when DHS files a petition alleging the essential facts of the child's situation and requesting specific relief. MCR 3.961. After DHS files a petition, the court must decide whether probable cause exists to authorize the petition at either a Preliminary Inquiry or a Preliminary Hearing. MCR 3.962; MCR 3.965. When a petition does not request placement of the child and the child is not in temporary custody, the court may conduct a Preliminary Inquiry to determine whether one or more of the petition's allegations is supported by probable cause. MCR 3.962(A). If a petition does request placement, the court may hold a Preliminary Hearing to determine if there is probable cause supporting one or more of the allegations. MCR 3.962(B). If, at this time, the court believes a child is at substantial risk of harm and that removal is necessary to protect the child's health and safety, the court may order the child into protective custody. MCR 3.963(B).

A Preliminary Hearing is the first required proceeding after DHS files a petition. It must commence within 24 hours after a child is taken into protective custody. MCR 3.965(A). The

court must determine whether the parent, guardian, or legal custodian (the "Respondent") has been duly notified and the hearing may be adjourned to secure the appearance of the Respondent. MCR 3.965(B)(1). The Respondent must be advised of the allegations in the petition, be given an opportunity to deny or admit the allegations, and be informed of the rights to the assistance of an attorney and to a trial on the petition's allegations. MCR 3.965(B). The process proceeds to the adjudicative phase if the court authorizes the filing of the petition.

2. The adjudicative phase follows the filing of a petition and allows a court to exercise jurisdiction over a child

During the adjudicative phase, the court determines by plea or by trial whether one or more of the statutory grounds for termination alleged in the petition has been proven. MCR 3.971; MCR 3.972(E). At any time after DHS files a petition, the Respondent may enter a plea of admission or no contest to the allegations. MCR 3.971(A). Before accepting a plea, the court must ensure that the Respondent is entering the plea knowingly, understandingly, and voluntarily. MCR 3.971(C)(1). The court may not accept a plea before establishing its accuracy. MCR 3.971(C)(2). An accurate plea that is knowingly, understandingly, and voluntarily made and accepted by the court is one of two bases for asserting jurisdiction over children. MCR 3.973.[5]

The second alternative for establishing jurisdiction over a child is by trial. *See* MCR 3.973 (noting that a dispositional hearing can only take place with respect to a child properly within the court's jurisdiction, following trial or a plea). If the Respondent has not pled to the allegations and the child is not in placement, the court must hold a trial within six months of the

[5] At the Preliminary Hearing, the court must decide whether to authorize the filing of the petition, and if authorized, whether the child should stay in the Respondent's home, be placed with another parent, guardian, or legal custodian, or be placed into foster care. *Id.* If placement is ordered, the agency designated to care for and supervise the child will prepare an Initial Service Plan. MCR 3.965(D).

petition's filing. MCR 3.972(A). If the child is in placement, the trial must commence within 63 days of the child's removal from the home. *Id.* At trial, the court decides whether one or more of the statutory grounds for termination has been proven. MCR 3.972(E).

3. The dispositional phase follows the adjudicative phase and allows a court to take specific action with respect to a child

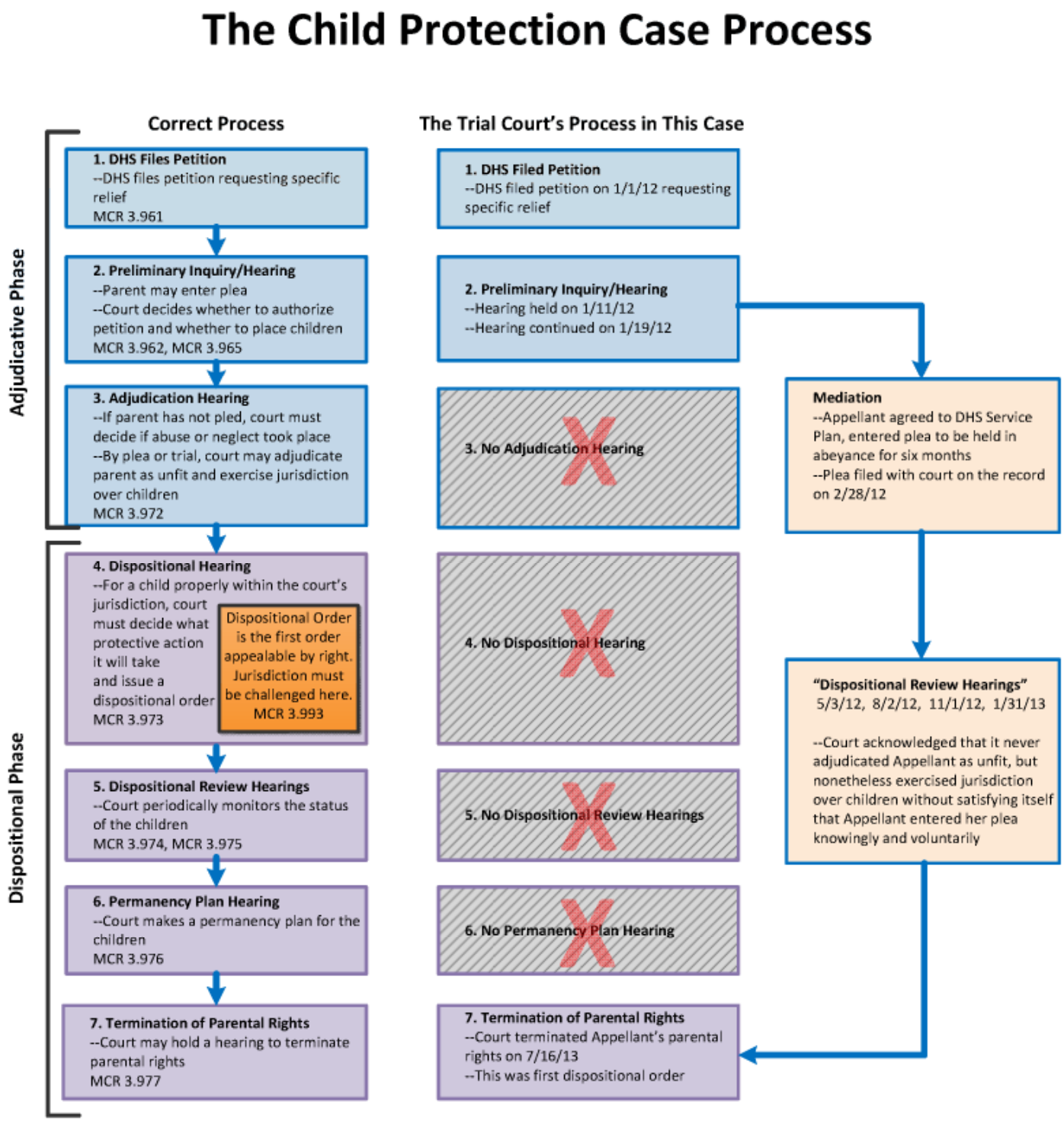
The process shifts from its adjudicative phase to its dispositional phase only after the parent has been adjudicated and the child is properly within the jurisdiction of the court. During this phase, the court holds a Dispositional Hearing to determine what protective action(s) to take. MCR 3.973(A). The court must enter an order of disposition outlining its plan for the family. MCR 3.973(F). This is the first order appealable by right, which again, must be preceded by a valid adjudication of the parent. MCR 3.993; *In re McCarrick/Lamoreux*, 307 Mich App 436, 461-462; 861 NW2d 303 (2014) (holding that only orders of disposition removing minors from the home are appealable by right).[6]

MCR 3.993 provides appeals as of right from (i) an order of disposition placing a minor under the supervision of the court or removing the minor from the home, (ii) an order terminating parental rights, (iii) any order required by law to be appealed to the Court of Appeals, and (iv) any final order. The trial court's exercise of jurisdiction may be attacked after the initial order of disposition. *Hatcher*, 443 Mich at 438-439; *In re SLH*, 277 Mich App 662, 668-669; 747 NW2d 547 (2008). If an initial order of disposition is issued, jurisdiction may not

[6] Post-Dispositional Review Hearings on the progress of the child must be conducted periodically, as required by statute. MCR 3.974; MCR 3.975. If the child is placed outside the home, a Permanency Planning Hearing must be held to determine where the child will live and whether parental rights will be terminated. MCR 3.976. If DHS seeks termination of parental rights the court must hold a Termination Hearing, and if rights are terminated, it must conduct periodic post-termination review. MCR 3.977; MCR 3.978.

be attacked after a subsequent order terminating parental rights. *In re SLH*, 277 Mich App at 668-669.

This process is outlined below:



B. The trial court failed to follow the Court Rules, never adjudicated Appellant to be an unfit parent, and never properly exercised jurisdiction over the children

The trial court's process outlined in the chart above that culminated in the termination of Appellant's parental rights did not follow the Court Rules. On January 11, 2012, DHS filed a petition, the children were removed from the home, and the court held a Preliminary Hearing that continued on January 19, 2012. Br. for Appellant at 8. At the Preliminary Hearing, Appellant waived her right to a probable cause hearing, the Petition was authorized, and the matter was scheduled for mediation. Mediation was in lieu of proceeding to the normal adjudication hearing at which the court would traditionally decide whether to exercise jurisdiction over the children by plea or trial. *Id.*

On February 28, 2012, the parties engaged in mediation and agreed that Appellant would participate in a DHS Service Plan and sign a Plea of Admission that would be held in abeyance for six months. *Id.* at 9. The plea and mediation agreement were filed with the court, but the parties never appeared before a judge and Appellant's plea was never formally accepted by the court. *Id.* The court then held what it erroneously called "dispositional review hearings." These were not dispositional review hearings because the court had not adjudicated Appellant to be an unfit parent, had not properly taken jurisdiction over the children, and had not proceeded to the dispositional phase. *Id.* at 10-11. In fact, all of these hearings were pre-adjudication hearings.

On January 31, 2013, the court held another mistitled "dispositional review hearing." At this point, the court essentially determined that mediation had failed because Appellant did not comply with the DHS Service Plan. Upon this determination, the proper course of action would have been to the return to the process mandated by the Court Rules. Since Appellant waived probable cause, the next step should have been adjudication either by a knowing, voluntary, and intelligent plea on the record before the court, or following a trial. Mediation did not permit the

court, however well intentioned, to avoid the Court Rules or to circumscribe the constitutional protections those rules are designed to protect.

Instead of following the Court Rules, at the January 31, 2013 hearing, the court acknowledged that it had never properly exercised jurisdiction over the children or adjudicated Appellant:

> [I]f there hasn't been an established jurisdictional level, based on the mediation, I will take at this point, formal jurisdiction as an Act 87 ward. I think there probably is an order or something to that effect in the file, but if there's not, there will be as of today based . . . on the stipulated mediation results. That's the purpose, my understanding, of the mediation was to avoid the need for a Jury trial and findings and putting people through that. Now, the failure to comply since August . . . by the mother is a post-mediation event, so I think that I can go back and say that we have a basis for jurisdiction, we have a basis for placement.

Id. at 11-12. The court then entered an adjudication finding based on the mediation agreement without ever confirming that Appellant's plea was entered voluntarily, knowingly, understandingly, and accurately, as required by the Court Rules. *Id.* at 12. Next, despite Appellant's absence, the court found that Appellant had not satisfactorily fulfilled the terms of the mediation agreement and that there was a basis for placement of the children. *Id.* The court thus issued an order entitled "Order Following Dispositional Review/Permanency Planning Hearing" (which is not an order of disposition) and concluded that it had jurisdiction over the children and that DHS could seek termination of Appellant's parental rights:

> Based upon the stipulated Mediation Resolution, the court takes formal jurisdiction of the minor children as an Act 87 Ward . . . . DHS may file a supplemental pleading setting forth termination of parental rights of any of the three parents, if warranted. Court is not ordering DHS to file the petition.

Id.

This process short-circuited the proper framework for child protective proceedings: the court improperly accepted a plea during what it called a "dispositional review hearing" and never properly took jurisdiction over the children. It is axiomatic that a court may only take jurisdiction over a child if "at least one statutory ground for jurisdiction in MCL 712A.2(b)" is proven at an adjudicative trial pursuant to MCR 3.972 or following a plea to the allegations in the jurisdictional petition obtained pursuant to MCR 3.971. *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008). The court did not conduct an adjudication trial, instead holding what it called a "dispositional review hearing" even though jurisdiction had not been established. Appellant did not attend that hearing and no evidence suggests the court noticed the hearing as required by MCR 3.972 and MCR 3.920. At this hearing, the court entered the plea Appellant offered during mediation months earlier, and made no attempt to satisfy itself that the plea was entered knowingly, understandingly, and voluntarily as required by MCR 3.971(C)(1). The court also failed to determine if the factual sufficiency for the plea was accurate and never questioned Appellant as required by MCR 3.971(C)(2). The court thus never conducted a proper adjudication and did not have a basis for asserting jurisdiction over the children. Without jurisdiction, the court could not properly proceed to a Dispositional Hearing or enter a dispositional order.

On June 26, 2013, notwithstanding the improper assertion of jurisdiction, the court held a termination hearing, which was the first hearing post-"adjudication." On July 16, 2013, the court terminated Appellant's parental rights. *Id.* At no point between the January 2013 "adjudication" and the June 26, 2013 termination hearing did the court conduct an Initial Dispositional Hearing or any Dispositional Review Hearings. The June 26, 2013 termination hearing effectively constituted the Initial Dispositional Hearing following the improper adjudication. Consequently,

the order terminating Appellant's parental rights was the first dispositional order, which is appealable by right. MCR 3.993; *see In re McCarrick/Lamoreux*, 307 Mich App at 461-462; *see also In re SLH*, 277 Mich App at 668-669 ("If termination occurs at the initial disposition, an attack on the adjudication is direct and not collateral . . . ."). *Cf. Hatcher*, 443 Mich at 438-439 (holding that the court's exercise of jurisdiction must be challenged directly).

For these reasons, Appellant's appeal is timely and direct because the termination order was the first dispositional order, which is the first order appealable as of right.

C. The collateral attack rule announced in *In re Hatcher* does not apply because this case involves a direct attack on the trial court's erroneous exercise of jurisdiction

The collateral attack rule announced in this Court's opinion in *Hatcher* does not bar Appellant's appeal. Appellant, who was never adjudicated to be an unfit parent, is directly challenging the trial court's exercise of jurisdiction and never waived her right to challenge the adjudicative process. Therefore her appeal is not a collateral attack. *See In re Kanjia*, 308 Mich App 660; ___ NW2d ___; 2014 WL 7404542 (2014).

1. *Hatcher* bars only a narrow set of post-disposition appeals as collateral attacks

The parents in *Hatcher*, after being fully advised of their rights, entered into valid pleas that their child should become a temporary ward of the court. *Hatcher*, 443 Mich at 430. In doing so, the parents explicitly waived their constitutional right to an adjudication trial and intentionally consented to jurisdiction over them and their child. *Id.* Thus, they abandoned their right to an adjudication trial and their right to challenge the adjudicatory process on appeal. *See People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999) (holding that parties who intentionally relinquish a known right lose the ability to raise challenges to alleged errors on appeal).

Years later, the parents tried to challenge the trial court's exercise of jurisdiction by raising a technical challenge to the sufficiency of the adjudication findings made against them. On appeal, this Court considered the narrow issue of whether a probate court's assumption of subject matter jurisdiction over a child may be challenged by the child's parent after a termination decision and, if so, whether the entire termination proceeding could be declared void *ab initio*. *Id*. at 428. The Court held that "the probate court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *Id*. at 437. "The valid exercise of the probate court's statutory jurisdiction is established by the contents of the petition after the probate judge or referee has found probable cause to believe that the allegations contained within the petitions are true." *Id*. Completion of these proceedings allows a court to acquire jurisdiction through an adjudication hearing under MCR 3.972.

Hatcher reasoned that, although subject matter jurisdiction may be challenged at any time, the respondent in that case confused the distinction between whether the court has subject matter jurisdiction and whether the court properly exercised its discretion in applying that jurisdiction. *Id*. at 438. The Court concluded that a genuine lack of subject matter jurisdiction may be challenged at any time, but the exercise of that jurisdiction can be challenged only on direct appeal:

> Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked. Error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of

> jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made.

Id. at 438-439 (citing *Jackson City Bank & Trust v Frederick*, 271 Mich 538, 545-546; 260 NW 908 (1935). Because the respondent in *Hatcher* could have directly appealed the probate court's exercise of jurisdiction by challenging the sufficiency of the underlying petition—which was considered by the court at an adjudication hearing—he was not entitled to collaterally attack it following subsequent termination proceedings.

2. This appeal is a direct attack on the trial court's erroneous exercise of jurisdiction and *Hatcher* does not apply

Hatcher is factually and procedurally distinguishable from this case. The respondent in *Hatcher* focused his arguments on the procedure by which the probate court proceeded *after* it had adjudicated him as an unfit parent and established subject matter jurisdiction over his child on the basis of a DHS petition. The Court concluded that he could not collaterally attack the underlying adjudicative order after his parental rights had subsequently been terminated.

Here, by contrast, there never was an adjudication hearing at which Appellant was adjudicated as an unfit parent. Instead, the court held a hearing on February 4, 2012, at which it took jurisdiction under the guise of an "initial disposition hearing." But the Court Rules explicitly require that, unless the initial dispositional hearing "is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." No such notice was ever provided to the parties or Appellant in this case. Nor did the court ever enter an order of disposition as required by MCR 3.973(F)(1), which would have started the clock for Appellant's appeal as of right to the adjudication decision. Consequently, Appellant has never had the opportunity to challenge the court's exercise of jurisdiction over the children. This appeal is thus a direct, rather than collateral, challenge to jurisdiction and *Hatcher* is inapplicable.

Even more fundamentally, there never was an adjudication hearing because the parties engaged in court-sanctioned mediation. The parties' mediation agreement provided that Appellant's plea of admission would be held in abeyance—not that Appellant's plea would be deemed acceptable at a later time when the plea was accepted as entered. For these reasons too, *Hatcher* does not apply to this case because there never was an adjudicative order such that Appellant could be raising a collateral attack on the sufficiency of the petition.

The Court of Appeals recognized these principles in *Kanjia* and held that an unadjudicated parent's challenge to the trial court's exercise of its dispositional authority does not constitute a collateral attack and is therefore not barred by *Hatcher*. In *Kanjia*, the respondent father appealed from the trial court's order terminating his parental rights. He argued that because he was never adjudicated as unfit, the trial court violated his due process rights by subsequently terminating his parental rights. The Court of Appeals agreed. It held that the respondent's constitutional challenge to the trial court's termination order "is not collaterally attacking the trial courts' exercise of jurisdiction, but rather is directly challenging the trial court's decision to terminate the respondent's parental rights without first having afforded the respondent sufficient due process, i.e., an adjudication hearing at which the respondent's fitness as a parent was decided." *Kanjia*, 2014 WL 7404542 at *4.

Kanjia's analysis is directly applicable here. Appellant was never adjudicated as an unfit parent and therefore her appeal is not an impermissible collateral attack. Instead, Appellant must be permitted to challenge the trial court's erroneous exercise of jurisdiction—an exercise that did not comport with the Court Rules or the constitutional safeguards that must be afforded to all parents before their parental rights are infringed.

D. Even if this appeal were a collateral attack, *Hatcher* does not preclude constitutional challenges to a trial court's exercise of jurisdiction

Even if the Court were to hold that this is a collateral attack, *Hatcher* does not bar challenges to alleged constitutional defects in termination proceedings. This Court has recognized on numerous occasions that parents are entitled to due process if the state seeks to terminate their parental rights. *See, e.g., In re Rood*, 483 Mich 73, 122; 763 NW2d 587 (2009) ("a parent is entitled to procedural due process if the state seeks to terminate his parental rights"); *In re Sanders*, 495 Mich 394, 422; 852 NW2d 524 (2014) ("due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship"). Indeed, *Sanders* explained in great detail the nature of parents' fundamental liberty interest in the control, custody, and care of their children:

> A parent's right to control the custody and care of her children is not absolute, as the state has a legitimate interest in protecting 'the moral, emotional, mental, and physical welfare of the minor' and in some circumstances 'neglectful parents may be separated from their children.' *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (quotation marks and citation omitted). The United States Constitution, however, recognizes 'a presumption that fit parents act in the best interest of their children' and that 'there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of [fit parents] to make the best decisions concerning the rearing of [their] children.' *Troxel [v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.)]. Further, the right is so deeply rooted that '[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . . *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 499 (1982).

Sanders, 495 Mich at 409.

Moreover, this Court has limited the rule announced in *Hatcher* to parents who have been found to be properly within the jurisdiction of the court who later attempt to challenge the court's adjudication on technical grounds. Most notably, in *Sanders*, the Court allowed a parent who

had never waived his right to challenge the adjudicative process to appeal a dispositional review order terminating his parental rights based on the trial court's failure to adjudicate him. *Sanders*, 495 Mich at 422-423. In that case, the respondent mother, after being advised of her procedural rights, entered into a no contest plea agreement to the allegations in the petition. The child's father separately requested a trial on the allegations against him. The trial court applied the one-parent doctrine, adjudicated the children as neglected, ordered the children into foster care, and required the father to comply with services based on the mother's plea. At a subsequent dispositional review hearing, the father filed a motion challenging the court's authority to remove the children from his care and ordering him to comply with services, since he had never been adjudicated unfit. The court denied his request and the Court of Appeals denied the father's application for leave to appeal.

This Court reversed the trial court's order and held that the trial court exceeded its authority by issuing a dispositional review order infringing upon the father's constitutional rights absent a proper adjudication of unfitness against him. Significantly, the Court issued this ruling despite the fact that the father had not appealed the initial dispositional order. Thus, the Court limited application of *Hatcher*'s collateral attack rule to adjudicated parents who are extensively advised of their procedural rights during termination proceedings and did not apply the rule to an unadjudicated parent who never had the opportunity to properly waive his right to an adjudication trial.

Similarly, in *In re Mays*, 490 Mich 993; 807 NW2d 307, this Court reversed an order terminating the parental rights of an unadjudicated father. At issue in *Mays* was the constitutionality of the one-parent doctrine, which although unaddressed in *Mays*, was later deemed unconstitutional in *Sanders*. Nonetheless, the Court explicitly noted that the

unadjudicated father in *Mays* retained his right to challenge the constitutionality of the one-parent doctrine on remand in the trial court. *Id*. at 994 n 1. By the time *Mays* reached this Court, the case was well beyond the initial disposition hearing, after which the unadjudicated father had not filed an appeal as of right. Hence, the Court again preserved the right of an unadjudicated parent to challenge the validity of an underlying dispositional review order that infringed upon his parental rights based on the trial court's failure to adjudicate him as an unfit parent. If *Hatcher* had been strictly applied, this result would not have been possible. Furthermore, strict application of *Hatcher* to this case would leave *Rood*, *Sanders*, *Mays*, and their progeny as outliers on the family law landscape.

In sum, *Hatcher* is inapposite here. This case, like *Sanders*, does not involve a parent who was properly adjudicated to be an unfit parent, waived her right to challenge the adjudication, and yet still attempted to challenge valid factual findings made against him years later. Rather, the trial court failed to follow the Court Rules and denied Appellant procedural due process by failing to conduct an adjudicative hearing before terminating her parental rights. Appellant was never adjudicated to be an unfit parent and the trial court impermissibly took jurisdiction over her children without a validly entered plea.

E. This Court has consistently permitted parents to raise claims of error that directly impact the validity of termination of parental rights decisions

Sanders's recognition of a parents' right to challenge a dispositional review order based on the trial court's failure to adjudicate the parent should come as no surprise. This Court has long recognized that errors in child protective proceedings that directly impact the validity of subsequent termination decisions are subject to appellate review.

This Court has consistently held that child protective proceedings are continuous and as such, errors in early proceedings can have a direct impact on subsequent proceedings and

determinations. *See, e.g.*, *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010); *Rood*, *supra*; *In re Hudson*, 483 Mich 928; 763 NW2d 618 (2009); *In re Mitchell*, 485 Mich 922; 773 NW2d 663 (2009). Child protective proceedings are considered continuous because the evidence presented therein builds from one hearing to the next, so that in effect, the hearings constitute one continuous proceeding. *See In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973) (describing a child protective case as a single continuous proceeding).

In each of the cases cited above, this Court permitted parents to directly appeal the termination of their parental rights based, in large part, on alleged errors committed by the trial court in the early stages of child protective proceedings because those errors impacted the validity of the ultimate termination decision. For example, in *Mason*, this Court reversed the termination of an incarcerated parent's rights in part because the trial court failed to facilitate his participation via telephone at earlier hearings and DHS failed to offer him services. *Mason*, 486 Mich at 146. The Court reasoned that errors made during earlier proceeding impacted and consequently invalidated decisions made during later hearings. *Id*. Similarly, in *Rood*, this Court reversed the termination of a father's parental rights because the trial court failed to make reasonable efforts to involve him in the proceedings and did not provide him with proper notice of earlier hearings, despite knowing his current address. *Rood*, 483 Mich at 111. Again, this Court recognized that when a trial court denies the opportunity to become meaningfully involved in an early-stage child protective proceeding, that error can directly impact a subsequent termination decision. *Id*. Finally, in *Hudson* and *Mitchell*, this Court held that the trial court erred in failing to advise parents of their procedural rights during the adjudication phase, including the failure to advise of the right to counsel and that their adjudication pleas could be used in a later proceeding to terminate their parental rights. *Hudson*, 483 Mich at 928; *Mitchell*,

485 Mich at 922. In each of those cases, this Court reasoned that the trial court committed specific errors in earlier proceedings that affected the validity of the later decision to terminate parental rights. As Justice Corrigan aptly noted in *Hudson*, "[T]he combination of the trial court's errors at the preliminary hearing in failing to appoint counsel and in accepting respondent's invalid plea affected the entire proceeding that followed." *Hudson*, 483 Mich at 935 (CORRIGAN, J., *concurring*). Justice Corrigan concluded that "[t]he consequences of these errors pervaded the 26-month child protective proceeding that followed and deprived respondent of due process." *Id.*

So it is here. The trial court's failure to properly adjudicate Appellant is precisely the same type of error that pervaded the child protective proceedings and deprived parents of due process in *Mason*, *Rood*, *Hudson*, and *Mitchell*. Preventing improperly adjudicated parents like Appellant from challenging the validity of a termination order based on a failure to afford due process in underlying proceedings would create the very real possibility that the State would terminate the rights of presumptively fit parents. This cannot be. The Constitution only permits States to terminate the rights of parents based on clear and convincing evidence of unfitness. *Santosky*, 455 US at 753.

IV. CONCLUSION

For these reasons, Amici respectfully request that the Court reverse the judgment of the Court of Appeals and remand this case to the trial court for an adjudication that conforms to the procedural mandates of the Court Rules and the constitutional protections guaranteed to parents.

Respectfully Submitted,

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